

Supreme Court, U. S.

FILED

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

78-487

MELCHOR MARQUES URIA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE NINTH CIRCUIT COURT OF APPEALS

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

 No.

MELCHOR MARQUES URIA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION
SERVICE,

Respondent.

 PETITION FOR A WRIT OF CERTIORARI TO
 THE NINTH CIRCUIT COURT OF APPEALS

Petitioner respectfully prays that a
 Writ of Certiorari issue to review the
 judgment and opinion of the United States
 Court of Appeals for the Ninth Circuit
 entered June 7, 1978, and upon timely
 Motion for Rehearing, affirmed July 24,
 1978.

The pertinent opinions are found in

the Appendix. The opinion of the Immigration Judge, page 1a; the opinion of the Board of Immigration Appeals, page 14a; the Judgment of June 7, 1978, page 24a; the Order of July 24, 1978, page 26a. The Judgment is not yet reported.

JURISDICTION

Petitioner timely appealed to the Court of Appeals pursuant to 8 U.S.C. 1105(A) from a final order of the Board of Immigration Appeals denying an adjustment of status and reinstating an Order for Deportation. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part,

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

8 U.S.C. 1255(a) provides:

"(a) The status of an alien, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved."

8 U.S.C. 1182 is set forth in pertinent part in the Appendix, page 28a.

QUESTION PRESENTED

The proceedings below raise the fundamental question of whether the Fifth Amendment applies to deportation hearings, and if so, may the alien's reliance on the Fifth Amendment be the basis of deportation.

More specifically, where Immigration Service finds that an alien meets all statutory requirements for adjustment to permanent resident, but denies adjustment and orders deportation on the basis that the alien took the Fifth Amendment on a question relevant to an undefined administrative discretion, does this Court pursuant to Kimm v. Rosenberg, 363 U.S. 405 (1960) mandate that the Courts of Appeal uphold deportation, or is there a constitutional right not to be penalized for taking the Fifth Amendment in a deportation hearing pursuant to Spevack

v. Klein, 385 U.S. 511 (1967)?

STATEMENT OF THE CASE

Petitioner last entered the United States from Spain as a non-immigrant sheepherder on July 23, 1964. The Immigration and Naturalization Service ordered deportation because Petitioner no longer worked as a sheepherder.

On April 14, 1975, the Service approved a "Relative Immigrant Visa Petition" for the Petitioner, which was filed on Petitioner's behalf by Petitioner's brother, a United States citizen. A visa was immediately available for the Petitioner. On July 23, 1975, Petitioner moved to reopen the deportation proceedings and for an adjustment of status to permanent resident.

On September 2, 1975, the District Director granted the Motion to Reopen

the deportation hearing and ordered that the Order of Deportation be withdrawn if the Immigration Judge granted adjustment of status.

Deportation hearing was held before T. P. Jakoboski, Immigration Judge, on December 3, 1976. The Petitioner was asked and answered questions relating to his statutory eligibility for permanent residence in accordance with the criteria of 8 U.S.C. 1255(a) and 8 U.S.C. 1182. Petitioner denied membership in the Communist Party, mental defect, conviction of two or more offenses, or any other statutory basis for ineligibility.

Petitioner was asked questions about a large sum of money that he had in his possession in 1972. The Petitioner refused to answer on the basis of the Fifth Amendment.

The Immigration Judge held that the

Petitioner had met all the statutory criteria, but relief was denied because the Petitioner, by taking the Fifth Amendment, prevented the Judge, "From making a full inquiry into whether he deserves such relief in the exercise of my administrative discretion". (See Appendix, page 1a for full ruling).

Timely appeal was filed to the Board of Immigration Appeals. The Board upheld the Immigration Judge's denial on the basis that the Petitioner, by taking the Fifth Amendment, prevented the Judge "from reaching a conclusion about the Petitioner's entitlement to the discretionary relief he seeks". (See Appendix, page 14a for full ruling).

It has been undisputed throughout the proceedings that the Petitioner meets all of the statutory grounds of 8 U.S.C. 1255(a) in that the Petitioner has made

an application, he is eligible for an immigrant visa, having met all of the requirements of 8 U.S.C. 1182, (i.e. he is not a member of the Communist Party, he has not been convicted of a drug offense, etc.), and a visa is immediately available to Petitioner. The pertinent section of 8 U.S.C. 1255(a), states: "may be adjusted by the Attorney General, in his discretion, and under such regulations as he may prescribe". The Attorney General has not prescribed any regulations to govern his discretion in granting adjustment. Neither section 8 U.S.C. 1255(a), nor section 8 U.S.C. 1182 make any requirement of good moral character. During the entire course of these proceedings, the Service has never stated in what manner the question which the Petitioner refused to answer was relevant to its administrative discretion.

The Service in its case law has held:

"Generally, favorable factors such as family ties, hardship, length of residence in the United States, etc., will be considered as countervailing factors meriting favorable exercise of administration discretion. In the absence of adverse factors, adjustment will ordinarily be granted, still as a matter of discretion." Matter of Arai, 13 I & N 494, 495 (1970).

No "adverse factors" other than reliance on the Fifth Amendment were shown here and the Petitioner showed favorable factors such as long residence in the United States, gainful employment and close relationship with his brother, a United States citizen.

Thus Petitioner not only met his burden of proof under the statute, but he also presented evidence that would ordinarily lead to favorable discretion. Deportation was ordered only because he took the Fifth Amendment as to a question which may in some undefined manner be

relevant to an undefined discretion.

Petitioner timely appealed to the Court of Appeals for the Ninth Circuit.

Petitioner's appeal was two pronged. Petitioner urged a violation of his Fifth Amendment rights, and further urged that by the Service's own test of balancing the equities, the equities predominated so strongly in Petitioner's favor that denial was an abuse of discretion.

On oral argument the Service urged that deportation was not a "penalty" and that therefore the Service had a right to deport based upon assertion of Fifth Amendment rights.

The Court of Appeals upheld the Service on the basis that:

"Petitioner contends that the Board of Immigration Appeals abused its discretion by denying his application for adjustment of status because he refused to testify as to the source of certain money and bank books found in his

possession when stopped for a traffic violation. In Kimm v. Rosenberg, 363 U.S. 405 (1960), the Supreme Court ruled that discretionary relief may be denied when an applicant fails to supply requested information which is relevant to the exercise of that discretion. Petitioner argues that the legal foundations of Kimm have been eroded. We are nonetheless required to adhere to that decision unless and until the Supreme Court overrules it." (See Appendix, page 24a).

The Court of Appeals did not address itself to Petitioner's argument relating to the equities, nor did it find any right to the Fifth Amendment in deportation hearings.

The Court of Appeals upheld deportation on the sole basis of Petitioner's reliance on the Fifth Amendment.

REASONS FOR GRANTING THE WRIT

1. THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL CONSTITUTIONAL QUESTION IN CONFLICT WITH THIS COURT'S REPEATED HOLDINGS FORBIDDING A PENALTY FOR TAKING

THE FIFTH AMENDMENT. RELYING ENTIRELY UPON A MISREADING AND GROSS ENLARGEMENT OF THIS COURT'S 1960 HOLDING IN KIMM V. ROSENBERG, THE NINTH CIRCUIT APPROVED DEPORTATION BECAUSE THE FIFTH AMENDMENT WAS TAKEN TO A QUESTION THAT MAY BE RELEVANT IN AN UNDEFINED WAY TO AN UNDEFINED DISCRETION, DESPITE THE FACT THAT ALL STATUTORY CRITERIA FOR ADJUSTMENT OF STATUS WERE MET.

The decision amounts to an unconstitutional repeal of the Fifth Amendment in immigration matters. The Ninth Circuit states that it is bound by Kimm v. Rosenberg, 363 U.S. 405 (1960), to uphold the Immigration Service's reinstatement of a deportation order based upon Petitioner's reliance on the Fifth Amendment in a deportation hearing.

The opinion of the Ninth Circuit is a misreading of this Court's holding in Kimm. Kimm involves an application for suspension of deportation in which the Attorney General refused to exercise his discretion on the basis that the applicant "had not met the statutory

requirements precedent to the exercise of discretionary relief", and taking the Fifth Amendment "did not relieve him (the applicant) under the statute of the burden of establishing the authority of the Attorney General to exercise his discretion in the first place." 363 U.S. at page 407-408. (Emphasis supplied).

The Kimm holding is a narrow one. Unlike the holding sub judice, Kimm does not base denial on ~~the exercise~~ of Fifth Amendment rights. Kimm simply states that the Service may deny suspension of deportation where the applicant fails to meet his burden of proof as to a statutory requirement. The Ninth Circuit decision would greatly enlarge the holding of Kimm, casting a much broader, heavier cloud upon Fifth Amendment rights.

The holding sub judice is not based on either of two prongs of Kimm, i.e. a

failure to meet a burden of proof, or a failure to meet statutory qualification, are not present here. The Ninth Circuit opinion is a bald statement upholding the penalty of deportation for reliance on the Fifth Amendment.

There is nothing in Kimm or any other case to provide a precedent that would permit the penalty of deportation to attach to Fifth Amendment rights.

Since the question at issue was allegedly relevant only to an undefined discretion, and it is not possible to think of any question that does not have this kind of vague relevance, the decision has a practical effect of complete repeal of the Fifth Amendment in deportation hearings.

The decision sub judice is in conflict with this Court's repeated holdings forbidding administrative bodies from extracting a "penalty" for taking the

Fifth Amendment, including Garrity v. New Jersey, 385 U.S. 493 (1967), Gardner v. Broderick, 392 U.S. 273 (1968), Uniformed Sanitation Men's Association, et al v. Sanitation Commissioner, 392 U.S. 280 (1968), which hold that the threat of discharge of public employees is a "penalty" which makes their Fifth Amendment rights too "costly"; Lefkowitz v. Turley, 414 U.S. 41 (1973), holding that a threat of cancellation of a public contractor's contracts makes the Fifth Amendment rights too "costly", and Spevack v. Klein, 385 U.S. 511 (1967), holding that an attorney in a bar disciplinary proceeding has a right to rely on the Fifth Amendment without the imposition of a penalty that makes that right more costly.

The decision sub judice is most clearly in conflict with this Court's rationale in Spevack v. Klein, supra, in

which this Court specifically refused to apply the Kimm rationale, thus:

"Kimm v. Rosenberg, 363 U.S. 405, 50 S CT 1139, 4 L ED 2d, 1299, most relied on here, was a five-to-four decision the other way and accurately reflected the Pre-Malloy v. Hogan construction of the Fifth Amendment. We do not stop to re-examine all the other prior decisions of that vintage to determine which of them, if any, would be decided the other way because of 'the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence' as defined in Malloy v. Hogan, *supra*, 378 U.S. at 8, 84 S CT 1493" (Italics added by the Court in Spevack) 385 U.S. at page 515.

Petitioner urged in the Court below, as he urges now, that the above line of cases applies to deportation, since the loss of the right to stay in the United States is at least as heavily a penalty for reliance on the Fifth Amendment, as a loss of employment or the loss of public

contracts.

The Court of Appeals reasoned that this argument merely went to the contention that "the legal foundations of Kimm have been eroded," and held that it was bound by Kimm, "unless and until the Supreme Court overrules it".

II. THE NINTH CIRCUIT'S DECISION IN FAILING TO RECOGNIZE FIFTH AMENDMENT RIGHTS IN IMMIGRATION MATTERS, AND IN HOLDING THAT THIS COURT'S LINE OF CASES FORBIDDING A PENALTY FOR RELIANCE ON THE FIFTH AMENDMENT WAS NOT APPLICABLE TO IMMIGRATION MATTERS, IS IN DIRECT CONFLICT WITH CONTRARY HOLDINGS IN THE SEVENTH CIRCUIT.

The Ninth Circuit decision appealed from holds that the Courts of Appeal are mandated by Kimm to uphold the Immigration Service in denying relief because an applicant has taken the Fifth Amendment.

The Ninth Circuit denies that this Court's pronouncements forbidding a penalty for the reliance on the Fifth Amendment applies to a deportation hearing.

This holding is in direct conflict

with the Seventh Circuit.

The Seventh Circuit in Rassano v. Immigration and Naturalization Service, 377 F.2d 971 (1967) remanded a deportation order because the Service had considered the alien's reliance on the Fifth Amendment as pertinent to administrative discretion. The Seventh Circuit specifically ordered that the Board of Immigration Appeals reopen and further review the deportation order in light of Spevack v. Klein, supra, and Garrity v. State of New Jersey, supra.

The conflict with the Seventh Circuit and all other available precedent is perhaps even more basic. The Ninth Circuit decision fails to recognize that there is a Fifth Amendment right in deportation hearings. The Seventh Circuit in Valeros v. Immigration and Naturalization Service, 387 F.2d 921 (1967) upholds the right to the Fifth Amendment privilege in a depor-

tation hearing and holds that testimony given under compulsion in a deportation hearing is not usable.

III. THE IMPORTANCE OF THE WRIT

Kimm v. Rosenberg, supra, a 1960 pre-Malloy v. Hogan, 378 U.S. 1 (1964) decision, is this Court's last word on the Fifth Amendment in relation to deportation matters.

In Kimm, this Court avoids the question of whether the Fifth Amendment specifically applies to deportation hearings, stating that whether the Petitioner was justified in his refusal to answer is a "question we do not pass upon". 363 U.S. at page 408.

The Ninth Circuit reads Kimm as binding it to uphold a basic denial of Fifth Amendment rights in deportation hearings. The Seventh Circuit has relied on more recent pronouncements of this Court as applicable to Fifth Amendment rights in

deportation hearings. This Court has never specifically spoken on the question of whether the threat of deportation is such a penalty as would make Fifth Amendment rights more costly. Further, this Court has never spoken on the basic issue of whether or not the Fifth Amendment applies to deportation questions. There is urgent need for clarification of a basic constitutional issue.

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit Court of Appeals.

Respectfully submitted,

FINN, FINN & FINN

By: Ruth G. Finn
 Ruth G. Finn
 Attorneys for
 Petitioner

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
 Immigration and Naturalization Service

File: A17 241 244 - Phoenix

December 3, 1976

IN THE MATTER OF

Melchor MARQUES-Uria IN DEPORTATION
 PROCEEDINGS
 Respondent.

CHARGE: I & N Act - Section 241(a)(9) -
 Failed to comply with conditions
 of non-immigrant status

APPLICATION: Adjustment of status under
 Section 245 of the Immigration
 and Nationality Act

IN BEHALF OF RESPONDENT:

Ruth G. Finn, Esq.
 3550 North Central Avenue
 Suite 415
 Phoenix, Arizona 85012

IN BEHALF OF SERVICE:

B. J. Rumaker, Esq.
 Trial Attorney
 El Paso, Texas

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O R D E R

The case was ordered reopened by the Board of Immigration Appeals on September 2, 1975 in order to afford the respondent the opportunity to apply for adjustment under Section 245 of the Immigration and Nationality Act.

In a previous order of the Board of Immigration Appeals in this case dated March 11, 1975, the Board sustained an Immigration Judge's denial of suspension of deportation. Before that Immigration Judge, the respondent invoked his constitutional privilege against self-incrimination under the Fifth Amendment in response to questions concerning the ownership or source of \$54,000.00 which he had in his possession when stopped by police for a traffic violation on July 15, 1972. Although not mentioned by the Board's decision, there were

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approximately \$32,000.00 in bank accounts represented in bank books in the respondent's possession on that same date. The Board indicated on page two of its decision of March 11, 1975 that "There was no question that the respondent had the right to invoke his constitutional privilege under the Fifth Amendment in this proceeding." The Board went on to say, "Counsel's argument suggests that the respondent is being penalized for invoking the Fifth Amendment." The Board noted "There's a distinction, however, between a case such as this one and cases in which an adverse inference is drawn from the invocation of the privilege citing, Griffin v. California, 380 U.S. 609 (1965)." The Board also distinguished cases in which a person suffers "adverse consequences because of official annoyance at the invocation

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of the constitutional privilege." The Board indicated on page three, "Here the respondent is seeking relief for which he is not entitled as a matter of right. Suspension of deportation is granted as a matter of the Attorney General's discretion, Section 244(a)." The Board cited the case of U.S. ex rel. Hintopoulos v. Shaughnessy, 353 U.S. 72, 77, (1957), which stands for the proposition that an application for suspension of deportation, which is a matter of discretion and of administrative grace, must, upon request of the Attorney General, supply such information that is within his knowledge and has a direct bearing on his eligibility under the statute. The Board, in its order of September 2, 1975, indicated "inasmuch as the criteria for adjustment of status under Section 245 differ from the criteria for

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suspension of deportation we shall grant the respondent's motion in order that the hearing be reopened to permit him the opportunity to make his new application. Of course in applying for adjustment of status (just as applying for suspension of deportation), the respondent must bear the burden to establish eligibility, and it will be incumbent upon him to supply whatever evidence is necessary for proper adjudication of his application."

I interpret the above quotation from the Board's opinion of September 2, 1975 to mean that the respondent not only must supply whatever information would be relevant to the determination of his statutory eligibility for the relief of adjustment of status but must likewise furnish whatever information would have a substantial bearing upon whether or not he merits the grant of such relief in

the exercise of my administrative discretion. With that in mind, we shall move forward to consideration of the evidence in this case.

I find that the respondent entered the United States on July 23, 1964 as an H-2, nonimmigration, shepherd. He was originally ordered deported on April 16, 1971 by Immigration Judge Karmiol. There was no appeal filed and that order was administratively final. However, the respondent through counsel filed a motion to reopen which was denied on May 24, 1971 by Immigration Judge Karmiol. The Board of Immigration Appeals on November 26, 1971 ordered reopening in order to apply for suspension of deportation. On November 6, 1972, the Immigration Judge denied suspension. An appeal was filed on November 20, 1972. On March 11, 1975 the Board dismissed the appeal from the

Immigration Judge's denial of the relief of suspension of deportation. On January 24, 1975 the respondent's United States citizen brother filed an I-130 petition seeking fifth preference for his brother, the respondent. Approval was granted on April 14, 1975. Counsel moved to reopen to apply for Section 245 relief and the Board granted the motion to reopen on September 2, 1975.

In the hearing before me today the respondent's testimony was very reluctant and evasive. Getting him to answer questions was like pulling teeth. I would rate his credibility at rather a low level. Today as in the earlier hearing the respondent invoked the privilege of self-incrimination when asked to state the source or ownership of the \$54,000.00 he had in his possession on July 15, 1972 or the ownership of the \$32,000.00,

approximately, that was related to the bank books in his possession. By invoking the privilege, which is his right, the respondent has cut off an important line of inquiry.

That is, statutory eligibility for the relief of adjustment of status requires that the respondent be eligible for an immigrant visa and that one be immediately available to him and that he not be otherwise inadmissible. The Immigration Service did not allege any bar to a finding of statutory eligibility. I would concur in this.

The question now comes down to the issue of whether or not the respondent deserves the benefit of adjustment of status in the exercise of my administrative discretion.

In making this determination I am guided by the Board's standards set

forth in the well-known Matter of Arai which were endorsed in the Attorney General's decision in the Blas decision. According to those decisions, an Immigration Judge is to weigh the factors and where there are no unfavorable factors, relief of adjustment of status would ordinarily be granted. On the other hand, where there are unfavorable factors not outweighed by favorable factors then the exercise of discretion shall be in the negative.

In the present case, the main favorable factor is the fact that he has the United States citizen brother. Like the respondent, however, the citizen brother at first invoked the privilege of self-incrimination when asked whether or not he had received any loans or gifts of any amounts of money more than \$1,000.00 from his brother, the

respondent. That is, he said that he was unwilling to state whether this was the case. However, when pressed he amended this and said that he merely did not remember. I would conclude from the supposedly poor memory of the brother of the respondent that actually he is an unwilling witness and I would place his credibility also at a very low level. There is no doubt, however, that the brother of the respondent possesses adequate funds with which to justify him filing an affidavit of support on behalf of the present respondent.

It might be considered that the applicant's stay here since July 1964 would be a favorable factor. I am not certain that this is all that favorable, he has eeked out his stay by means of various motions and appeals following his initial deportation back in 1971.

The respondent has had employment in the United States mainly as a bartender or a worker in a restaurant. He has had two known brushes with the law although there were no convictions. These related to a violation of the Phoenix City Code for permitting a dancer to expose herself and a rather seemingly trivial incident involving possible shoplifting of a felt-tip pen in a supermarket. As I mentioned, both of these charges were dismissed. Accordingly, I do not find the respondent's lengthy stay in the United States a very heavy favorable factor inasmuch as he has not done anything of significant merit to the society in this country and has not been supporting any family here.

In regards to unfavorable factors I would point out the lack of any family in the United States other than his United States citizen brother. When asked his

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actual address, the respondent was even unable to furnish an exact address at this hearing today. The respondent said that he did not remember ever filing an address report with the Immigration Service. He testified that he had never registered for the draft during his tenure in the United States.

I find a rather unfavorable factor the fact that the respondent has cut off a legitimate line of inquiry in these proceedings. Although it is not required that he show good moral character for any length of time in order to receive the benefit of adjustment of status, I find that I have been prevented from making a full inquiry into whether he deserves such relief in the exercise of my administrative discretion by his refusal to testify as to how he happened to have \$54,000.00 in his possession and bank

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books totalling \$32,000.00 at a time when he had a minimal income.

Accordingly, I find that the respondent has not complied with the injunction of the Board that it will be incumbent upon him to supply whatever evidence is necessary for proper adjudication of his application.

Accordingly, balancing the equities, I find that the respondent is not deserving of a favorable exercise of my administrative discretion. Accordingly, the following order will be entered.

ORDER: The respondent's application for relief of adjustment of status under Section 245 in the Immigration and Nationality Act as amended is denied.

/s/
T. P. JAKABOSKI
Immigration Judge

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UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS
Washington, D. C. 20530

File: A17 241 244 - Phoenix

August 19, 1977

In re: MELCHOR MARQUES-URIA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Ruth G. Finn, Esquire
51 West Weldon
Phoenix, Arizona 85013

ON BEHALF OF I&N SERVICE:

B. J. Rumaker
Trial Attorney

CHARGE:

Order: Section 241(a)(9), I&N Act
(8 U.S.C. 1251(a)(9)) -
Failed to comply with
conditions of nonimmigrant
status

APPLICATION: Adjustment of status under
section 245 of the Immigration
and Nationality Act

BY: Milhollan, Chairman; Wilson,
Appleman and Maguire, Board Members.

This is an appeal from an order of an
immigration judge, dated December 3, 1976,

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denying the respondent's application for
adjustment of status under section 245 of
the Immigration and Nationality Act in the
exercise of discretion. The appeal will
be dismissed.

The record relates to a single male
alien, a native and citizen of Spain, 43
years of age, who last entered the United
States on July 23, 1964 as a nonimmigrant
shepherd. He was found deportable
because of his failure to comply with the
conditions of his nonimmigrant status.
Thereafter, on March 11, 1975, we dis-
missed his appeal from denial of his
application for suspension of deportation.
Then, on January 24, 1975, the respondent's
United States citizen brother filed an
I-130 petition seeking fifth preference
for his brother. The petition was
approved. The respondent next moved to
reopen the proceedings to permit him to

apply for relief under the provisions of section 245 of the Act. In our order we made the following observation:

. . . in applying for adjustment of status (just as in applying for suspension of deportation) the respondent must bear the burden to establish eligibility and it will be incumbent upon him to supply whatever evidence is necessary for proper adjudication of his application.

The record discloses that the respondent was arrested on July 15, 1972 when he had \$54,000.00 in the trunk of the automobile that he was driving (mostly in bills of \$100 and \$50 denominations) and had bank books for accounts totaling more than \$32,000.

In his decision, the immigration judge noted that the respondent invoked the privilege against self-incrimination when asked to state the source of ownership of the \$54,000 he had in his possession on July 15, 1972 or the

ownership of approximately \$32,000 that was related to the bank books in his possession, thus cutting off an important line of inquiry required for a proper exercise of his discretion.

Counsel on appeal contends (1) that the immigration judge abused his discretion in denying the section 245 application because the respondent invoked his constitutional right against self-incrimination, and thus cut off the line of the immigration judge's inquiry whether he merited the privilege of adjustment of status; and (2) that the immigration judge's determination that the respondent's reliance on his constitutional right against self-incrimination is an adverse factor and was erroneous and contrary to modern constitutional law which forbids any "penalty" for invoking the Fifth Amendment. Counsel contends

that the respondent is entitled to adjustment of status under section 245 of the Act.

We have reviewed the record de novo and considered counsel's contentions on appeal. We have decided that adjustment of status is not warranted in the exercise of discretion.

Section 245 of the Act reposes with the Attorney General and his delegates the discretionary power to grant an adjustment of status. Thomaidis v. INS, 431 F. 2d 711 (9 Cir. 1970), cert. denied 401 U. S. 954 (1971); Matter of Arai, 13 I&N Dec. 494 (BIA 1970). Adjustment of status is, therefore, a matter of administrative grace, not mere statutory eligibility. Hintopoulos v. Shaughnessy, 353 U.S. 72 (1957); Ameeriar v. INS, 438 F. 2d 1028 (3 Cir. 1971). Thus, an applicant who meets the

objective prerequisites is merely eligible for adjustment of status; he is in no way entitled to such relief. Jarecha v. INS, 417 F. 2d 220 (5 Cir. 1969); Chen v. Foley, 385 F. 2d 929 (6 Cir. 1967), cert. denied 393 U.S. 838 (1968). The burden of proof is squarely upon the respondent to establish not only that he meets all statutory requirements for eligibility but also that he is worthy of the exercise of discretion in his favor. 8 C. F. R. 242.17(d); Ameeriar, supra, at 1030; Thomaidis, supra, at 712; Chen, supra, at 934. See, Jarecha, supra, at 223. Since the adjustment of status of an alien is an extraordinary relief, it should be granted only in meritorious cases. Ameeriar, supra, at 1032; Chen, supra, at 934.

We have consistently taken the position that when an alien seeks the

favorable exercise of the Attorney General's discretion, it is incumbent upon him to supply such information that is within his knowledge and is relevant and material to a determination of whether he merits the relief. Matter of Mariani, 11 I&N Dec. 210 (BIA 1965); Matter of De Lucia, 11 I&N Dec. 565 (BIA 1966); Matter of Francois, 10 I&N Dec. 168 (BIA 1963); Matter of Pires Da Silva, 10 I&N Dec. 191 (BIA 1963).

This position has been judicially upheld; De Lucia v. INS, 370 F. 2d 305 (7 Cir. 1966); Kimm v. Rosenberg, 363 U.S. 405 (1960); United States v. Anastasio, 120 F. Supp. 435 (D. N.J. 1954), reversed on other grounds 226 F. 2d 912, cert. denied 351 U.S. 931.

There is, as counsel argues, no proof of illegality or immorality with respect to the "unexplained large sum of

money" which was found in the respondent's possession at the time of his arrest for a traffic violation. Good moral character is not a statutory requirement for relief under section 245, as is the case, for example, with suspension of deportation (244). Nevertheless, an explanation of how one in the respondent's circumstances acquired such a large sum of money is obviously relevant to the exercise of the Attorney General's discretion. Lacking this information, the immigration judge was thereby prevented from reaching a conclusion about the respondent's entitlement to the discretionary relief he seeks. The respondent had every right to assert his claim under the Fifth Amendment. However, in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application for discretionary

relief. In these circumstances, the respondent failed to sustain the burden of establishing that he is entitled to the privilege of adjustment of status. In Jimenez v. Barber, 252 F. 2d 550 (9 Cir. 1958), the court stated, at p. 554 as follows:

"...the refusal to answer questions was in a proceeding in which the applicant sought nothing to which was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. The hazards in adopting an obstructive attitude in such proceedings must be at least as great as those involved in cases where established rights are sought to be enforced or protected."

Counsel cites Spevack v. Klein, 385 U.S. 511 (1967), for the proposition that an attorney at a bar disciplinary hearing had a full right to invoke the Fifth Amendment without the imposition of a "penalty," which makes that right

costly. We do not perceive the analogy of any penalty in this factual situation. The respondent here had no right to an adjustment of his status, a purely discretionary matter. We adhere to the reasoning in Kimm v. Rosenberg, supra. He had a right to file an application and to have it fairly considered on the evidence laid before the immigration judge and this Board. This we have done and find a serious gap leaving a question in our minds as to his suitability for the Attorney General's largesse. That doubt we will not resolve against the government as, in effect, he asks us to do. See Jay v. Boyd, 351 U.S. 345, 354 (1956); U.S. ex rel. Kaloudis v. Shaughnessy, 180 F. 2d 489 (2 Cir. 1950). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELCHOR MARQUES-URIA,)
)
 Petitioner,) NO. 77-3216
)
 v.) MEMORANDUM
)
 IMMIGRATION AND)
 NATURALIZATION SERVICE,)
)
 Respondent.)
)

(Filed July 7, 1978)

On Petition to Review a
Decision of the Immigration
and Naturalization Service

Before: BROWNING and WRIGHT, Circuit
judges, and
*KUNZIG, Judge, Court of Claims

Petitioner contends that the
Board of Immigration Appeals abused its
discretion by denying his application for
adjustment of status because he refused
to testify as to the source of certain
money and bank books found in his

*Honorable Robert L. Kunzig, Judge of
The United States Court of Claims,
sitting by designation.

possession when stopped for a traffic
violation.

In Kimm v. Rosenberg, 363 U.S.
405 (1960), the Supreme Court ruled that
discretionary relief may be denied when
an applicant fails to supply requested
information which is relevant to the
exercise of that discretion. Petitioner
argues that the legal foundations of Kimm
have been eroded. We are nonetheless
required to adhere to that decision
unless and until the Supreme Court
overrules it. Holmes v. Burr, 486 F.2d
55, 60 (9th Cir. 1973); Oppen v. Aetna
Insurance Co., 485 F.2d 252, 257 n.12
(9th Cir. 1973); cf. Hicks v. Miranda,
422 U.S. 332, 344-45 (1975); Brady v.
State Bar of California, 533 F.2d 502,
503 n.1 (9th Cir. 1976).

Affirmed.

26a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MELCHOR MARQUES-URIA,)
)
Petitioner,) NO. 77-3216
)
v.) ORDER
)
IMMIGRATION AND)
NATURALIZATION SERVICE,)
)
Respondent.)
)

(Filed July 24, 1978)

Before: BROWNING and WRIGHT, Circuit
Judges, and
*KUNZIG, Judge of the Court of
Claims

The panel as constituted in the
above case has voted to deny the petition
for rehearing and to reject the suggestion
for a rehearing in banc.

The full court has been advised
of the suggestion for in banc rehearing,
and no judge of the court has requested a

*Honorable Robert L. Kunzig, Judge of
the United States Court of Claims,
sitting by designation.

27a

vote on the suggestion for rehearing in
banc.

The petition for rehearing is
denied and the suggestion for a rehearing
in banc is rejected.

IMMIGRATION AND NATIONALITY - 8 USCS

§1182. Excludable aliens

(a) General classes. Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

(1) Aliens who are mentally retarded;

(2) Aliens who are insane;

(3) Aliens who have had one or more attacks of insanity;

(4) Aliens affected with psychopathic personality, or sexual deviation, or a mental defect;

(5) Aliens who are narcotic drug addicts or chronic alcoholics;

(6) Aliens who are afflicted with any dangerous contagious disease;

(7) Aliens not comprehended within any of the foregoing classes who are certified by the examining surgeon as having a physical defect.

...

(8) Aliens who are paupers, professional beggars, or vagrants;

(9) Aliens who have been convicted of a crime involving moral turpitude;

...

(10) Aliens who have been convicted of two or more offenses;

...

(11) Aliens who are polygamists or who practice polygamy or advocate the practice of polygamy;

(12) Aliens who are prostitutes or who have engaged in prostitution;

...

(13) Aliens coming to the United States to engage in any immoral sexual act;

(14) Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor;

...

(15) Aliens who, in the opinion of the consular officer at the time of application for a visa, or in the opinion of the Attorney General at the time of application for a visa, or in the opinion of the Attorney General at the time of application for admission, are likely at any time to become public charges;

(16) Aliens who have been excluded from admission and deported and who again seek admission;

...

(17) Aliens who have been arrested and deported;

...

(18) Aliens who are stowaways;

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact;

(20) Except as otherwise specifically provided in this Act, any immigrant who at the time of application for admission is not in possession of a valid unexpired immigrant visa, reentry permit, border crossing identification card, or other valid entry document required by this Act;

...

(21) Except as otherwise specifically provided in this Act, any immigrant at the time of application for admission whose visa has been issued without compliance with provisions of section 203 [8 USCS § 1153];

(22) Aliens who are ineligible to citizenship, except aliens seeking to enter as nonimmigrants;

...

(23) Any alien who has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana;

(24) Aliens ... who seek admission from foreign contiguous territory or adjacent islands;

...

(25) Aliens over sixteen years of age, physically capable of reading, who cannot read and understand some language or dialect;

(26) Any nonimmigrant who is not in possession of (A) a passport valid for a minimum period of six months;

...

(27) Aliens who the consular officer or the Attorney General knows or has reason to believe seek to enter the United States solely, principally, or incidentally to engage in activities which would be prejudicial to the public interest, or endanger the welfare, safety, or security of the United States;

(28) Aliens who are, or at any time have been, members of any of the following classes:

(A) Aliens who are anarchists;

(B) Aliens who advocate or teach, or who are members of or affiliated with any organization that advocates or teaches, opposition to all organized government;

...

(29) Aliens with respect to whom the consular officer or the Attorney General knows or has reasonable ground to believe probably would, after entry, (A) engage in activities which would be prohibited by the laws of the United States relating to espionage, sabotage, public disorder, or in other activity subversive to the national security;

...

(30) Any alien accompanying another alien ordered to be excluded and deported and certified to be helpless from sickness or mental or physical disability or infancy pursuant to section 237 (e) [8 USCS § 1227(e)], whose protection or guardianship is required by the alien ordered excluded and deported;

(31) Aliens who are graduates of a medical school not accredited;

...

No. 78-487

Supreme Court, U. S.

FILED

NOV 15 1978

MICHAEL ROBAR, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

MELCHOR MARQUES URIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
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Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-487

MELCHOR MARQUES URIA, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 24a-25a) and the decision of the Board of Immigration Appeals (Pet. App. 14a-23a) are not reported.

JURISDICTION

The order of the court of appeals was entered on June 7, 1978. A petition for rehearing was denied on July 24, 1978 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on September 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(l).

QUESTION PRESENTED

Whether the Fifth Amendment privilege against self incrimination permits the drawing of an adverse inference in the context of an immigration hearing on an

application for adjustment of status, where the alien refuses to provide information relevant to the exercise of discretion by the Attorney General.

STATEMENT

1. Petitioner is a native and citizen of Spain who last entered the United States in 1964 as a nonimmigrant shepherd. He was found deportable in 1971 because of his failure to comply with the conditions of the nonimmigrant status under which he was admitted (A.R. 202-207).¹ The Board of Immigration Appeals dismissed his appeal (A.R. 182-183). Petitioner then filed a motion to reopen his deportation proceedings in order to apply for suspension of deportation pursuant to 8 U.S.C. 1254 (A.R. 178). The motion to reopen was granted (A.R. 174-175), and a new hearing commenced on September 14, 1972. At the hearing, petitioner testified that, on July 15, 1972, he was arrested and given a traffic ticket by Phoenix police officers (A.R. 245). At the time of his arrest, the police found more than \$54,000 in the trunk of his car, mostly in \$100 bills (A.R. 320-325).² The car trunk also contained three bank books in petitioner's name. The bank books indicated that within three days, more than \$10,000 was deposited in each account (A.R. 321-322). Petitioner told the officer that he earned \$100 a week (A.R. 321).

At the hearing, petitioner was asked to explain his possession of these large sums of money. The immigration judge advised him that although he could avail himself of the Fifth Amendment privilege, "this could cause an adverse inference," and, as a result, there was a

¹"A.R." refers to the administrative record filed in the court of appeals.

²The police officer apparently intended to book petitioner for driving while intoxicated. Petitioner asked the officer to get his money out of the car (A.R. 320).

"possibility" that his application for suspension of deportation would be denied (A.R. 251, 261-262).³ On advice of counsel, petitioner declined to answer questions about the source of the \$54,000 and about his bank accounts.⁴ Thereafter, the immigration judge denied petitioner's application for suspension of deportation as a matter of discretion (A.R. 162-172).

The Board of Immigration Appeals affirmed the immigration judge's decision on a different ground—that petitioner had failed to establish his statutory eligibility for the relief sought (A.R. 125-128).⁵ Petitioner did not appeal from the Board's decision of March 11, 1975 and does not challenge its correctness here.

2. On July 23, 1975, petitioner submitted a new motion to reopen his deportation proceeding, in order to apply for adjustment of his immigration status to that of a lawful permanent resident alien, pursuant to 8 U.S.C. 1255 (A.R. 91-92). The Board granted his motion to reopen (A.R. 87-88), and the reopened hearing took place on December 3, 1976. At that hearing, it was conceded that petitioner was statutorily eligible for adjustment of

³Petitioner was also advised that any statement he made could be used against him "by any other branch of the United States Government" (A.R. 261).

⁴Counsel stated (A.R. 268, 326) that he had advised petitioner to refuse to answer because there was an ongoing investigation of petitioner by the Internal Revenue Service, and that he would advise petitioner to answer the questions when the IRS investigation was concluded.

⁵An applicant for suspension of deportation must establish, *inter alia*, that deportation would result in "extreme hardship" to himself or certain enumerated immediate relatives who are United States citizens or lawful permanent residents.

Petitioner claimed that he would suffer "extreme hardship" because he could not receive his workmen's compensation award of eleven dollars a month if he left Arizona. The Board held that the facts of record "suggest that he is a man of substantial means. Hence, he has failed to establish the hardship alleged" (A.R. 128).

status.⁶ The sole question was whether he merited that "extraordinary" relief as a matter of administrative discretion (A.R. 43, 65).⁷

Petitioner was asked the following question: "[W]ere you ever called in by the Internal Revenue Service to account for the huge amount of cash you had on your person at the time of your traffic arrest back in 1972?" (A.R. 62). After counsel's objection on the ground of relevancy had been overruled, she stated that she would instruct petitioner to invoke the Fifth Amendment privilege "[a]s to any question dealing with money" (A.R. 63). The immigration judge then reminded counsel that in 1972, at the hearing on petitioner's application for suspension of deportation, counsel for petitioner had stated that petitioner would answer questions regarding financial matters after the IRS had completed its investigation (A.R. 64). Counsel responded (*ibid.*) that although there had "been an investigation * * * and no charges were filed, * * * that kind of investigation, essentially, is never complete." The immigration judge, while recognizing petitioner's right to invoke the Fifth Amendment privilege, stated that "this would have considerable bearing on whether or not he deserves [adjustment of status relief] in the exercise of * * * discretion" (A.R. 65-66).

Petitioner's brother, Pedro Marques, also testified at the hearing. He stated that he employed petitioner as a bartender at the Copper State Buffet, in Phoenix, and that petitioner earned approximately \$60 a week (A.R. 76-77, 105). When asked whether his brother had ever given or lent him large amounts of money, Marques

⁶Petitioner's brother, a naturalized American citizen, had submitted a visa petition in his behalf which was approved by INS.

⁷See, e.g., *Ameeriar v. INS*, 438 F. 2d 1028 (3d Cir. 1971); *Chen v. Foley*, 385 F. 2d 929 (6th Cir. 1967), cert. denied, 393 U.S. 838 (1968).

claimed that he could not remember (A.R. 79-80, 82-83), or alternately, that he did not wish to answer the question (A.R. 79). He did not invoke the Fifth Amendment privilege. At the hearing it was also brought out that petitioner had been arrested for shoplifting and for allowing a "go go" dancer to perform an "indecent exhibition" at the Copper State Buffet (A.R. 44, 327-328). Neither incident resulted in a conviction.

The immigration judge denied petitioner's application the exercise of discretion (A.R. 39-46; Pet. App. 1a-13a). The judge listed several unfavorable factors which, in his opinion, militated against granting petitioner the relief sought. Among these were the two arrests already mentioned, petitioner's failure to file required address reports with INS, the evasive testimony of petitioner's brother, petitioner's lack of family ties in the United States (other than his brother), and the fact that petitioner had unduly prolonged his stay in this country by various motions and appeals (A.R. 43-44). The decision also stated (A.R. 45):

I find a rather unfavorable factor the fact that [petitioner] has cut off a legitimate line of inquiry in these proceedings. Although it is not required that he show good moral character for any length of time in order to receive the benefit of adjustment of status, I find that I have been prevented from making a full inquiry into whether he deserves such relief in the exercise of my administrative discretion by his refusal to testify as to how he happened to have \$54,000 in his possession and bank books totalling \$32,000 at a time when he had a minimal income.

Petitioner appealed, arguing that the immigration judge's decision was an abuse of discretion in that it had impermissibly penalized petitioner's reliance on his Fifth Amendment privilege. The Board of Immigration Appeals affirmed the immigration judge's decision (A.R. 4-7; Pet.

App. 14a-23a), and the court of appeals affirmed the Board's decision (Pet. App. 24a-25a). The Board held that petitioner "had every right to assert his claim under the Fifth Amendment. However, in so doing he runs the risk that he may fail to carry his burden of persuasion with respect to his application for discretionary relief" (Pet. App. 21a-22a). The Board and the court of appeals both relied on *Kimm v. Rosenberg*, 363 U.S. 405 (1960).

ARGUMENT

Petitioner contends (Pet. 12-17) that the decision below is in conflict with a number of this Court's decisions interpreting the Fifth Amendment privilege.⁸ He argues that the *Garrity-Lefkowitz* line of cases undercuts the authority of *Kimm v. Rosenberg*, *supra*.⁹ But, we submit, petitioner's argument is foreclosed by this Court's decision in *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

Palmigiano was a state prison inmate charged with inciting a prison disturbance. He was summoned before the prison Disciplinary Board and informed that he might be prosecuted for a violation of state law. He was also told that although he had a right to remain silent during the disciplinary hearing his silence would be held against him (*id.* at 312). He was informed that anything he said in the disciplinary hearing could be used against him in a criminal proceeding (*id.* at 333, Mr. Justice Brennan concurring in part and dissenting in part). Palmigiano remained silent during the hearing in the face of evidence

⁸*Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Sanitation Men v. Sanitation Comm'r*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

⁹In *Kimm* the alien applied for suspension of deportation. This Court upheld the determination that the alien had not met his statutory burden of showing eligibility for the relief requested where, invoking the privilege, he refused to respond to the question whether he was a communist.

that incriminated him. The Disciplinary Board's decision was that he be placed in "punitive segregation" for 30 days and that his classification be downgraded thereafter (*id.* at 312-313). The "disciplinary penalty was imposed to some extent, if not solely, as a sanction for exercising the constitutional privilege" (*id.* at 332, Mr. Justice Brennan concurring in part and dissenting in part).

This Court distinguished the line of cases from *Garrity* to *Lefkowitz* on the ground that those decisions all involved situations where "the States, pursuant to statute, sought to interrogate individuals about their job performance or about their contractual relations with the State; insisted upon waiver of the Fifth Amendment privilege not to respond or to object to later use of the incriminating statements in criminal prosecutions; and, upon refusal to waive, automatically terminated employment or eligibility to contract with the State" (425 U.S. at 316-317).

The Court observed (*id.* at 317) that in *Palmigiano* "[n]o criminal proceedings are or were pending against Palmigiano." The state had not, contrary to *Griffin v. California*, 380 U.S. 609 (1965), sought to make evidentiary use of Palmigiano's silence at the disciplinary hearing in any criminal proceeding. Nor had the state insisted or asked that Palmigiano waive his Fifth Amendment privilege. He was notified that he was privileged to remain silent if he chose. Although he was advised that his silence could be used against him, he was not as a consequence of his silence automatically found guilty of the infraction with which he had been charged. As the Court continued (*id.* at 318-319):

In this respect, this case is very different from the circumstances before the Court in the *Garrity-Lefkowitz* decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the

other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt. Here, Palmigiano remained silent at the hearing in the face of evidence that incriminated him; and as far as this record reveals, his silence was given no more evidentiary value than was warranted by the facts surrounding his case. This does not smack of an invalid attempt by the State to compel testimony without granting immunity or to penalize the exercise of the privilege. The advice given inmates by the decisionmakers is merely a realistic reflection of the evidentiary significance of the choice to remain silent.

* * * * *

Our conclusion is consistent with the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a *party to a civil cause*." 8 J. Wigmore, Evidence, 439 (McNaughton rev. 1961). In criminal cases, where the stakes are higher and the State's sole interest is to convict, *Griffin* prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt. Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime. We decline to extend the *Griffin* rule to this context.^[10]

¹⁰The Court went on to quote Justice Brandeis' opinion for a unanimous Court in *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923), a deportation case: "Silence is often evidence of the most persuasive character" (*id.* at 319).

In the instant case, the government did no more than was deemed permissible in *Palmigiano*. It did not compel petitioner to waive his Fifth Amendment privilege. It did not make evidentiary use of petitioner's silence at the immigration hearing in any criminal proceeding. Petitioner's application for adjustment of status was not automatically denied as a consequence of his silence; on the contrary, "his silence was given no more evidentiary value than was warranted by the facts surrounding his case." 425 U.S. at 318.¹¹ See *Lefkowitz v. Cunningham*, 431 U.S. at 801, 808 n.5 (1977).

Indeed, petitioner's legal position is even weaker than that of *Palmigiano*. The latter was penalized as a result of his silence while petitioner was merely denied a *discretionary* immigration benefit as to which he had the burden of proof. See 8 C.F.R. 242.17(d); *Santos v. INS*, 375 F. 2d 262 (9th Cir. 1967); *Tibke v. INS*, 335 F. 2d 42 (2d Cir. 1964). We submit that "not every undesirable consequence which may follow from the exercise of the privilege * * * can be characterized as a penalty," *Flint v. Mullen*, 499 F. 2d 100, 104 (1st Cir. 1974), and that the discretionary denial of favorable status to an applicant who has prevented full assessment of his qualifications does not violate the Fifth Amendment. See *McGautha v. California*, 402 U.S. 183 (1971); *Hintopoulos v. Shaughnessy*, 353 U.S. 72, 77 (1957); *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953). See also *Cabral-Avila v. INS*, No. 77-1626 (9th Cir. May 30, 1978) (although aliens may invoke the Fifth Amendment privilege in deportation proceedings, they do not thereby shield themselves from

¹¹Both the immigration judge and the Board of Immigration Appeals based their decisions on the fact that petitioner's silence "cut off a legitimate line of inquiry" (Pet. App. 12a) and "prevented [the immigration judge] from reaching a conclusion about [petitioner's] entitlement to the discretionary relief he seeks" (*id.* at 21a).

deportation if they have the burden of proof with respect to any determinative issue).¹²

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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Attorneys

NOVEMBER 1978

¹²Contrary to petitioner's assertions (Pet. 17-19), there is no conflict between the decision below and decisions of the Seventh Circuit. *Valeros v. INS*, 387 F. 2d 921 (7th Cir. 1967), merely held that testimony compelled in violation of the Fifth Amendment may not be used in a deportation hearing. In *Rassano v. INS*, 377 F. 2d 971 (7th Cir. 1967), the court of appeals remanded a case for further consideration in light of *Spevack* and *Garrity*, where the immigration judge denied suspension of deportation at least in part because of the alien's invocation of the Fifth Amendment privilege before a grand jury. We do not know the precise facts in *Rassano*; in any event, the per curiam remand order in that case preceded this Court's decision in *Palmigiano*.